A lawsuit challenging the constitutionality of Proposition 65 as it applies to food products has been filed in the U.S. District Court in San Francisco by the Committee for Uniform Regulation and Labeling (CURL). The state filed a motion to dismiss the CURL suit for lack of proper venue, but the motion was denied by the court in October 1988. No trial date has been set.

In a related matter, environmental and labor groups filed suit May 31, 1988 against the California Health and Welfare Agency for allegedly delaying action against suspected toxic substances in food, drugs and cosmetics. The state's 14-month schedule for evaluating food, drugs and cosmetics began July 1 and is based on the Scientific Advisory Panel's recommendation. Trade associations representing the food, drug and medical device and cosmetic industries have intervened. There have been no developments since the motions for intervention were granted.

In addition, the AFL-CIO and environmental groups filed suit June 22, 1988 against the Governor to compel the designation of the Environmental Protection Agency as an "authoritative body" and to require the Scientific Advisory Panel to identify other organizations that should be so designated. GMA and the Environmental Working Group have intervened.

Other Developments

The White House Domestic Policy Council met July 27, 1988 to consider whether the federal government should nullify the authority of California's Proposition 65 to require consumer warnings on food products. The food industry urged the President to issue an Executive Order preempting the state law on the basis that it conflicts with the "federal regulatory purpose" or orderly interstate commerce. At the meeting, the Domestic Policy Council directed its staff to study the state law "to see if it creates the kind of conflicts that might warrant a federal preemption." In December, the Council's staff reported that Proposition 65 does not cause an economic burden significant enough to warrant a federal preemption.

In January 1989, former U.S. Health and Human Services Secretary Otis Bowen and Food and Drug Administration Commissioner Frank Young sent a regulatory proposal providing for an FDA preemption to the Office of Management and Budget for review. The proposal is still pending OMB review.

####

2021391228

Source: https://www.industrydocuments.ucsf.edu/docs/gghm0000

Other State Toxics Activity

An initiative was filed in Colorado in March of 1988 to place a "Clean Air/Environment" constitutional amendment on the ballot. As filed, this measure would have required the Governor to publish a list of "known hazardous chemicals" as identified by any state agency or by any administrative or judicial proceedings to be hazardous to the health or welfare of any person or to the environment. The petition was later withdrawn due to time constraints. The initiative's proponents, Coloradans for Clean Air, Water and Land, decided to postpone the initiative filing process until 1989 to prepare it for certification for the 1990 ballot. A new initiative has not yet been filed.

Oregon is a traditionally environmentalist state and an obvious site for import of California's Proposition 65. In 1987, the Senate Majority Leader introduced a toxics bill, but it did not move. Since Oregon permits the direct initiative, the possibility also exists for an initiative to be filed on this issue.

H2334, a toxics use reduction measure backed by the Oregon Public Interest Research Group, was the subject of a hearing March 1 before the House Environment and Energy Committee. The bill would authorize the state to ban certain chemicals and products and would impose a tax on the first point of sale or use of other toxics brought into or produced in the state. The legislation is being monitored closely for any developments that could impact the industry. The measure is still pending in the Environment and Energy Committee.

Indoor air quality legislation backed by the Oregon Lung Association and the Department of Environmental Quality was introduced by the House Environment and Energy Committee. The bill, H3244, would prohibit smoking in all public areas and office workplaces and would raise the cigarette tax by one cent to implement indoor air pollution programs. The measure would also authorize the Oregon Health Division to establish indoor air quality standards for "significant indoor air pollutants," including particulate matter, aldehydes, radon, carbon monoxide, carbon dioxide, ozone and water vapor. An earlier draft of the bill would have imposed a "hazardous substance surcharge" instead of the cigarette excise. A hearing was held on April 3 in the House Environment and Energy Committee. It is still pending in committee.

Tobacco Litigation

Certain affected industries in California had implementation plans prepared for Proposition 65 and reacted immediately to the emergency regulations issued in February 1988. The Grocery Manufacturers of America (GMA) instituted and advertised a telephone "hot-line" for consumers who wish to know what listed chemicals might be contained in common food products. Cigar manufacturers voluntarily chose to advertise a "warning" and to distribute signs to its retailers as part of the general implementation effort. However, the Environmental Defense Fund (EDF) and other environmental groups strongly criticized the use of the "hotline" (or 800 number), charging that it is no substitute for "genuine" warnings to consumers, and that relying on it gives no protection against liability under Proposition 65.

In response to a 60-day notice filed August 2, 1988 by EDF, California Attorney General John Van de Camp filed suit September 30 in the San Francisco Superior Court against manufacturers and retailers of cigars, pipe tobacco and roll-your-own tobacco for failing to provide adequate health warnings under Proposition 65. The state Attorney General asked the court to enjoin all future violations and to impose a civil penalty of up to $2,500 per day per violation. Responding to the lawsuit, Southern California's largest supermarket chain removed all cigars and pipe tobacco from its shelves. Two other chains warned tobacco companies that they would take similar action if warnings were not added to cigars and loose leaf tobacco products.

In an effort to avoid lengthy and costly litigation, producers of cigars and loose leaf tobacco products settled the lawsuit October 18 by agreeing to label individual packages: "Warning: This Product Contains/Produces Chemicals Known To The State of California To Cause Cancer And

2021391226

Source: https://www.industrydocuments.ucsf.edu/docs/gghm0000

STATELINE

SPECIAL REPORT

THE TOBACCO INSTITUTE
STATE ACTIVITIES DIVISION

April 4, 1989

1989

STATE TOXIC & HAZARDOUS SUBSTANCE LEGISLATION

This is an update to the March 8, 1989 edition of the StateLine Special Report on 1989 State Toxics and Hazardous Substance Legislation.

Background

The passage of the broadly-written California Proposition 65 in November 1986 widened the traditional arena for regulation of so-called "hazardous substances" to include such commonly-used consumer products as food, cosmetics, alcoholic beverages and tobacco products.

Since the enactment of Proposition 65, several states have introduced similar types of legislation and initiatives and several others have requested information and copies of the law from environmental organizations. In 1988, copycat bills were proposed in Hawaii, Illinois, Massachusetts, Michigan, Missouri, New York and Tennessee. However, none of these measures were considered and all died with the adjournment of the 1988 legislatures. A mini-version of the law was proposed as an initiative in Colorado, but was later withdrawn.

The industry must anticipate introduction in other states of legislation, initiatives and regulatory actions similar or identical to California's Proposition 65 and its reliance upon a "scientific advisory panel" and state agencies to determine "lists" of chemicals, chemical mixtures and levels of exposure constituting a hazardous or toxic substance. Such "listing" authority was proposed in Arizona legislation in 1988 and in a ballot initiative in Washington state in the November elections. The Arizona proposal died in committee; however, the ballot initiative was approved by Washington state voters.

Update on California Proposition 65

Emergency regulations for the chemicals included on the first "Governor's list" include requirements for signs to be posted stating: "Warning: This Area Contains a Chemical Known to the State of California to Cause Cancer." Warnings are required to be posted where the public or employees are exposed to such substances in the environment.

On January 29, 1988, the Scientific Advisory Panel placed tobacco smoke and smokeless tobacco products on the second "Governor's list" of "known carcinogens," requiring that public warnings be provided by businesses for exposure to these substances effective April 1, 1989.

In preparation for the April 1 warning requirement, the California Hotel and Motel Association and the California Restaurant Association distributed signs to their members reading: "Warning: This Facility Permits Smoking and Tobacco Smoke is Known to the State of California to Cause Cancer." The California Chamber of Commerce will be distributing information and generic warning signs to its membership on April 10.

2021391223

Document Retrieved from www.tobaccodocuments.org/ttd/ttdg0000

packaging known to cause cancer or reproductive toxicity. Warnings could be provided by product or packaging labels, shelf labels, menus or signs, depending on what is feasible and practical. The legislation provides for civil penalties of up to $2,500 per day per violation. H626 has been referred to the House Consumer Protection Committee. S174 has not yet been given a committee assignment.

Massachusetts Rep. Larry Alexander has reintroduced his 1988 Proposition 65 legislation. The bill, H5109, will be heard in the Joint Natural Resources and Agriculture Committee on April 18. The measure would require the Public Health Commissioner to publish a list of those chemicals identified by the Public Health Department to be carcinogens or reproductive toxins. Also, this list would have to contain chemicals that "are required by state or federal law to have been tested for the potential to cause cancer or reproductive toxicity but have not been adequately tested." The bill would prohibit an intentional exposure of any individual to a significant amount of a listed carcinogen or reproductive toxicant without first giving clear and reasonable warning. Private citizens would be allowed to sue to enforce the law after 60-day notice to law enforcement authorities. The bill would require that warnings be "prominently displayed so as to be seen by affected consumers," apparently ruling out an 800-number system as an adequate warning. In addition, it would provide for civil penalties for violations of up to $25,000 per day per violation.

On March 30, the Grocery Manufacturers of America held a coalition meeting in Boston of food and drug groups on H5109. Representatives of the Grocery Manufacturers and the Massachusetts Food and Restaurant Associations discussed the general legislative outlook and strategy for the April 18 hearing. The Associated Industries of Massachusetts is working to coordinate witnesses and testimony in conjunction with the food and drug coalition.

In a related matter, the State Public Interest Research Group (MassPIRG) has reintroduced its "comprehensive toxics use reduction" legislation, H1929, for consideration in 1989. (In November 1988, the state House of Representatives passed the legislation but the Senate did not consider the bill before adjournment.) As written, the bill does not impact the industry; however, if it fails to pass the legislature in 1989, MassPIRG may pursue a ballot initiative in 1990 containing the provisions of both Alexander's bill and toxics use reduction. The MassPIRG bill currently has more than 100 co-sponsors.

A coalition led by the Associated Industries of Massachusetts (AIM) has introduced an alternative measure to the PIRG bill based on hazardous waste minimization. The bill, H3851, the "Hazardous Waste Elimination and Management System Act," has 59 co-sponsors. The major sponsors are Reps. Robert Havern and and Edward Kirby. The AIM coalition has appointed a negotiating team to meet with MassPIRG representatives to discuss the business community's alternative. The Dukakis Administration is expected to be active in pushing for a legislative compromise between the two groups. A hearing was held on H3851 and H1929 on March 7 in the Joint Natural Resources Committee. Testimony was presented by business and environmental groups. No action was taken by the Committee and no further action is expected on these bills until the on-going negotiations between AIM and MassPIRG on a compromise bill are completed in April.

New York Assemblyman Neil Kelleher has reintroduced a Proposition 65-type measure, A2273, that would require the Commissioner of Environmental Conservation to establish a list of chemicals known to the state to cause cancer or reproductive toxicity. Businesses would be required to give "clear and reasonable" warning before exposure to listed chemicals. The measure has been referred to the Assembly Environmental Conservation Committee. In a related matter, Senator Caesar Trunzo reintroduced the "Safe Drinking Water Act," modeled after the Proposition 65 water discharge prohibitions. The bill, S4109, would require the Commissioner of Health to promulgate a list of substances known to cause cancer or reproductive toxicity in humans. Businesses would be prohibited from discharging or releasing any listed substance into any source of drinking water. Assemblyman Lewis Yevoli introduced its companion in the Assembly, A6519. S4109 and A6519 have been referred to their respective Environmental Conservation Committees.

2021391225

Source: https://www.industrydocuments.ucsf.edu/docs/gghm0000

Birth Defects Or Other Reproductive Harm." These products must be labeled beginning 150 days from settlement. In the interim, the manufacturers must notify retailers and distributors in California offering to provide warning shelf signs and posters, and to run notices in California newspapers. The settlement also provides that the manufacturers will not rely on any toll-free information service for Proposition 65 compliance. Under the settlement, no fines will be imposed against the tobacco manufacturers and current warning signs will satisfy Proposition 65 requirements in the 150-day period before warnings are required on packages. The suit against the retailers is still pending.

Other Litigation

The Pennsylvania Plate and Glass (PPG) Industries has agreed to pay settlement costs of $75,000 in response to a suit filed against the company by the Solano County District Attorney. The suit charged PPG Industries with failure to adequately warn customers of potential risks of chemicals used in their products and alleged that the warning posters provided to stores by the manufacturer were not properly positioned. The Solano County District Attorney stated that it is the responsibility of the manufacturer to instruct the retailer how to warn its customers.

The Chemical Specialties Manufacturers Association (CSMA) filed a lawsuit March 2, 1989, challenging requirements under Proposition 65 and Proposition 105 (the so-called "right-to-know" initiative passed in November 1988) that manufacturers place warnings on products. The CSMA Board of Directors authorized the lawsuit under the warning requirements of Proposition 65, claiming that they are preempted by several federal statutes, including FIFRA and OSHA. CSMA is also challenging Proposition 105 based on state law limiting each ballot initiative to one subject.

On December 30, 1988, a California Superior Court rejected the Attorney General's motion to dismiss a suit over whether the 800 telephone system satisfies Proposition 65's clear and reasonable warning requirement. The Ingredient Communication Council (ICC), a manufacturers coalition, filed suit in September in defense of the toll-free system. The state argued that the ICC's suit should be dismissed since the adequacy of the toll free number would be addressed in the grocery chain/tobacco suit. The court found that the Attorney General's enforcement suit against the grocery chains focused primarily on the labeling of tobacco products while the ICC's suit deals specifically with the adequacy of the toll-free warning system.

Solano County Deputy District Attorney Pollock filed suit December 28 against the California Building Industry Association to enforce the warning provisions of Proposition 65. The suit alleges that the Proposition 65 warning signs posted at a residential development in the county, as well as information listed in a pamphlet published by the Association, are insufficient under the law since neither the warning sign nor the pamphlet designates which substance is being warned for or where the "affected area" is. The complaint requests that a warning be substance and site specific. The suit also proceeds under the Unfair and Unlawful Business Practice Act claiming that the defendants knowingly and intentionally distributed warnings and pamphlets containing misleading, false and incorrect information. The suit seeks civil penalties and injunctive relief.

In December 1988, the Chemical Manufacturers Association and the Chemical Industry Council of California filed suit against the California Health and Welfare Agency to force a decision on the preemption of the OSHA federal workplace warnings over those required under Proposition 65. The case is pending in federal district court in Sacramento. In response to the CMA suit, the state Attorney General argued that the suit is inappropriate since the Proposition 65 requirements could be incorporated into its state OSHA plan with the reactivation of CAL-OSHA. CMA is filing a motion for summary judgment.

2021391227

Source: https://www.industrydocuments.ucsf.edu/docs/gghm0000

The American Lung Association (ALA) of Los Angeles County held a press conference on March 30 and is distributing information packets to businesses on the Proposition 65 warning requirements for tobacco smoke. The ALA is recommending the following text to comply with the warning requirement: "Warning: This Facility Permits Smoking in Designated Areas. Tobacco Smoke is Known to the State of California to Cause Cancer." The ALA's packet also contains information on where to file complaints and grievances.

The Scientific Advisory Panel's Subpanel on Reproductive Toxicity included environmental tobacco smoke among substances it intends to consider listing as a reproductive toxicant at the Subpanel's next meeting.

1989 State Proposals

California Senator Quentin Kopp introduced legislation (S65) that would include state government agencies under Proposition 65's provisions. Similar legislation introduced in 1988 was vetoed by the Governor. A hearing is scheduled for April 17 in the Senate Toxics Committee. Another measure, A42, by Assemblyman Bill Jones, would revise Proposition 65's exposure exemption for reproductive toxins and revise the definition of "significant amount" by establishing a more scientifically-based safety factor. On March 28, the bill failed in the Environmental Safety and Toxic Materials Committee by a vote of 6-4; however, a motion for reconsideration was granted. A bill introduced by Assemblyman Burt Margolin, A1469, would require the state Occupational Safety and Health Standards Board to revise the state Code of Regulations regulating carcinogens in the workplace to include all carcinogens on the Proposition 65 list. A1469 is pending in the Assembly Labor and Employment Committee.

Florida Senator Javier Souto introduced a bill, S384, that would require the Department of Environmental Regulation (DER) to compile a list of substances that are deemed toxic or otherwise hazardous to humans and which pose a serious threat to public health or the environment. Beginning October 1990, any person who manufactures, imports, transports or distributes at wholesale any listed substance would be required to register with the DER and maintain a permanent record of all sales of the listed substances. S384 has been referred to the Senate Natural Resources and Conservation Committee. Its companion, H1169, introduced by Representative Tim Ireland, has been referred to the House Environmental Regulations Committee. Both bills have second referrals to their respective Appropriations Committees.

Hawaii House Speaker Dan Kihano introduced a bill, H52, the "Public Environmental Health and Information Act of 1989." The bill would mandate the Department of Health to create an official list of chemicals known to cause cancer, damage to the immune system or reproductive harm. The bill would also mandate the Health Department to create a public information system on the contamination of drinking water sources and to establish an advisory committee to assist in its implementation. H52 was reported favorably by the Health Committee with amendments on February 15. It was referred to the Planning, Energy and Environmental Protection (PEEP) Committee where a hearing was held on February 23. After hearing testimony, the committee chairman announced that he would hold the bill for further study. H52 was not reported by the March 3 committee deadline for action and is therefore dead for 1989.

S144, by Senator Gerald Hagino, would establish a Department of Environmental Protection. The Health Department would transfer its duties relating to environmental matters to the new Environmental Protection Department. S144 was reported favorably with amendments by the Agriculture Committee on February 15. It was referred to the Ways and Means Committee. The bill was not reported by the committee deadline for action and is therefore dead for 1989.

Illinois Senator Howard Brookens and Representatives Ellis Levin and Peg Breslin introduced the "Food Toxics Disclosure Act." (S174, H626), on March 14. The bills are modeled after Proposition 65 but are limited to foods and food packaging. The legislation would require the Department of Public Health to publish a list of chemicals known to cause cancer or reproductive toxicity and to appoint a Food Toxics Disclosure Advisory Committee. The bills would require businesses to provide warnings before exposure to chemicals in food and food

2021391224

Source: https://www.industrydocuments.ucsf.edu/docs/gghm0000